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10/698,871

10/31/2003

Mannie Lee Clapp

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06/17/2008

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EXAMINER

HARDEE, JOHN R

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MANNIE LEE CLAPP,  
ROBERT RICHARD DYKSTRA, and  
REBECCA ANN TAYLOR

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Appeal 2008-3204  
Application 10/698,871  
Technology Center 1700

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Decided: June 17, 2008

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Before CHUNG K. PAK, ROMULO H. DELMENDO, and  
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

DELMENDO, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from a final rejection of  
claims 1-5, 7-9, and 12-22. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

Appellants state that they invented “rinse-off personal care compositions comprising a perfume polymeric particle, which is useful as a delivery system for a perfume raw material (‘PRM’), methods for making such personal care compositions and methods of treating substrates, such as skin and/or hair with such personal care compositions” (Specification, hereinafter “Spec.,” 1, ll. 10-13).

Representative claim 1 on appeal reads as follows:

1. A personal care composition comprising:
    - a) a personal care adjunct ingredient; and
    - b) a water insoluble perfume polymeric particle having an average particle size of from about 100 nm to about 39  $\mu\text{m}$ ; said water insoluble perfume polymeric particle comprising:
      - i) a anionic polymer and
      - ii) a perfume comprising one or more perfume raw materials having one or more of the following characteristics;
        - a) a number molecular weight of less than about 200;
        - b) a boiling point of less than about 250°C;
        - c) a ClogP of less than about 3; and
        - d) a Kovats Index value of less than about 1700;
- wherein a Response Factor (RF) of the perfume polymeric material is at least about 1.6;
- wherein said personal care composition further comprises a cationic deposition polymer aggregated with said perfume polymeric particle.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Ehret

EP 0 925 776 A2

Jun. 30, 1999

The Examiner rejected claims 1-5, 7-9, and 12-22 under 35 U.S.C. § 103(a) as unpatentable over Ehret (Examiner's Answer mailed Aug. 24, 2007, hereinafter "Ans.," 3-4).

### ISSUE

Have Appellants demonstrated reversible error in the Examiner's determination that the subject matter of the appealed claims would have been obvious to a person having ordinary skill in the art in view of the applied prior art?

### FINDINGS OF FACT

1. Ehret teaches "polymers which show specific affinities towards odiferous products and which adsorb and slowly release these molecules when used as perfuming agents in applications where long lasting effects are wished, e.g. in cosmetic products, deodorants, air refresheners, laundry products such as detergents and fabric softeners, or in fibers for fabrics" (¶0011).
2. According to Ehret, the polymers are formed by polymerizing functional monomers and crosslinking agents in the presence of the odiferous product(s) to be imprinted and a radical generator as catalyst (¶0013).
3. Ehret discloses the use of various monomers such as methacrylic acid or quaternized ammonium alkyl (meth)acrylate as the functional monomer (¶¶0014-0017).
4. The Examiner acknowledged the differences between Ehret and Appellants' claimed subject matter as follows: (1) "While

Kovats Indexes, RFs and ClogPs are not disclosed...”; (2) “[n]o particle size is disclosed”; and (3) “[u]sing a cationic polymer in conjunction with an anionic polymer is not specifically disclosed” (Ans. 3).

5. The Examiner stated (Ans. 5):

Regarding ‘aggregation’ [of the cationic deposition polymer with the perfume polymeric particle], this is a product-by-process limitation. Appellant has not argued its importance in distinguishing over the prior art. Appellant has made an aggregated composition and a comparative, non-aggregated composition...but does not provide any comparative data.

#### PRINCIPLES OF LAW

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’ ” *KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1734 (2007).

*KSR* reaffirms the analytical framework set out in *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1 (1966), which states that an objective obviousness analysis includes: (1) determining the scope and content of the prior art; (2) ascertaining the differences between the prior art and the claims at issue; and (3) resolving the level of ordinary skill in the pertinent art. *KSR*, 127 S. Ct. at 1734. Secondary considerations such as commercial success, long felt but unsolved needs, or failure of others “might be utilized

to give light to the circumstances surrounding the origin of the subject matter sought to be patented.” *Id.* (quoting *Graham*, 383 U.S. at 17-18).

While *KSR* rejected a formalistic and rigid application of the teaching, suggestion, or motivation test as an exclusive test in the obviousness inquiry, it nevertheless made clear that an invention “composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art” and that “it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine elements in the way the claimed new invention does.” *KSR*, 127 S. Ct. at 1741.

#### ANALYSIS

Appellants contend that the Examiner erred because the claims on appeal require a cationic deposition polymer aggregated with the perfume polymeric particle but the applied prior art reference (Ehret) does not teach or suggest this component (Appeal Brief filed May 24, 2007, hereinafter “Br.,” 6). The Examiner admits as much (Facts 1-5). Nevertheless, this limitation was given no weight because “aggregation” was considered to be “a product-by-process limitation” and, in the Examiner’s view, Appellants did not argue “its importance in distinguishing over the prior art” (Ans. 5).

We agree with Appellants that the Examiner’s rejection cannot stand. The claim term “aggregated” in each of the independent claims imparts a structural relationship between the cationic deposition polymer and the perfume polymeric particle. The Examiner cannot simply dismiss this difference by asserting that “Appellant has not argued its importance” when, in fact, Appellants *did* argue that the prior art did not teach or suggest the

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claimed cationic deposition polymer, which is in aggregated form relative to the perfume polymeric particle.

Because the Examiner did not properly resolve an argued difference between the claimed subject matter and the prior art, we must reverse.

### CONCLUSION

On this record, we determine that Appellants have demonstrated error in the Examiner's conclusion that the subject matter of the appealed claims would have been obvious within the meaning of 35 U.S.C. § 103(a).

### DECISION

The Examiner's decision to reject appealed claims 1-5, 7-9, and 12-22 is reversed.

### REVERSED

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